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PP

v.

MOHD AZAM BASIRON & ANOR

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COURT OF APPEAL, PUTRAJAYA
SURIYADI HALIM OMAR JCA
HASAN LAH JCA
AHMAD MAAROP JCA
[CRIMINAL APPEAL NO: J-05-17-2004]

C

12 MARCH 2010

CRIMINAL LAW: *Penal Code - Section 302 - Murder - Prima facie case - Whether established - Testimony of accomplice witness - Whether reliable - Whether there was independent corroborative evidence to support*

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testimony of witness - Whether prosecution proved main ingredients of charge - Whether charge defective - Whether respondents entitled to acquittals

EVIDENCE: *Corroboration - Murder - Testimony of accomplice witness - Whether there was a shred of independent corroborative evidence to support testimony - Whether prosecution proved main ingredients of charge - Whether charge defective - Prima facie case - Whether established*

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The respondents were charged with murdering one Wee Ah Choon, the deceased person, under s. 302 of the Penal Code on 18 May

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2001 at about 1am to 5am at the Poliklinik Ehsan, Jalan Sulaiman, Muar, Johor. As the prosecution failed to establish a *prima facie* case against them they were acquitted forthwith without the defence being called. The prosecution being dissatisfied thereupon filed the necessary notice of appeal hence the matter herein. The facts were

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that on 20 May 2001, a corpse (later identified as the deceased person) was found at Kilometer 12, Jalan Batang Kali at Goh Tong Jaya with a piece of green wire still entwined around the neck. The police managed to arrest SP7 who became the main witness for the prosecution. According to SP7, each night between 11pm to

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midnight, on behalf of Syarikat Ong Cheng Tock, a licensed moneylender, SP7 would collect loan repayment of RM100 from the second respondent (R2), a doctor of Poliklinik Ehsan. In the course of collecting the repayments, R2 complained to him about his indebtedness to the deceased, alias "Azman" and had asked SP7 to

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help him kill the deceased person. On the night of the murder,

SP7 testified that he went to the clinic as usual. R2 was with the deceased person at the rear room. As soon as SP7 and the first respondent (R1) an employee of the clinic entered the rear room, SP7 held the deceased's shoulders, followed by R1 striking him on the head with a piece of wood. After that, according to SP7, a person named Haris had twisted a wire around Azman's neck. At that material time, the deceased was slumped in the wheelchair. Haris and both respondents helped push the wheelchair to the front of the clinic towards a red car, where the deceased was lifted and placed on the rear seat. The deceased's body was recovered two days later in a state of decomposition with the cause of death being compression on the neck. The case for the defence, however, was that as SP7 had given his statement to the police eight days after his arrest his testimony thus was not worthy of credit. R1 and R2 denied their involvement and submitted that the prosecution had failed to prove a *prima facie* case hence the acquittal of R1 and R2 without their defence being called. The learned judge when acquitting them at the prosecution's stage opined that the evidence of SP7 required examination as it was unsafe to convict on the uncorroborated evidence of an accomplice in this case. Hence, this appeal by the prosecution.

Held (dismissing the appeal)
Per Suriyadi Halim Omar JCA:

(1) SP7, by his own admission, was an accomplice, having been involved from the beginning until the moment the deceased was transported away in a red car. The facts clearly revealed that he had participated in the killing of the deceased person and openly confessed his complicity in the whole episode. In normal circumstances, he would be one of the persons charged but not in this case. By co-operating with the prosecution, he had purchased immunity for his offence (*Rex v. Mullins* 3 Cox's CC 526). Due to his unique status, his evidence had to be tested as against his very own, the other evidence adduced by the prosecution neutral or otherwise, his conduct, manner of giving his testimony and the like. (paras 14 & 17)

(2) It was found that SP7's testimony was far from being impeccable. There was not a shred of independent corroborative evidence to support the testimony of SP7 regarding what actually happened during the time of the killing. To be

corroborative the evidence must be independent and reliable, and touching on material issues, which implicate the respondents. In the course of sifting through the evidence, several questions arose that caused certain consternations and which did not augur well for the prosecution. (para 18)

(3) It is trite that in every charge the offence with which an accused person is charged is specified, and in this case of murder under s. 302 of the Penal Code. The Criminal Procedure Code further demands that the charge shall contain such particulars as to the time and place of the alleged offence and the person against whom the thing in respect of which it was committed as are reasonably sufficient to give the accused person notice of the matter with which he is charged. For a *prima facie* case to be established successfully, in order for the defence to be called, the prosecution must prove the main ingredients of the charge. As at this stage, the prosecution only managed to establish the identity of the deceased person and his death. (para 19)

(4) There was no doubt that the charge indicated that R1 and R2 killed the deceased, with the assistance of a few people at Poliklinik Ehsan between the hours of 1am to 5am on 18 May 2001. The evidence of the deceased's wife confirmed that his death could not have been during those given times as per the charge. The wife had filed a police report on 20 May 2001 stating that the deceased person left the matrimonial home on 18 May 2001 at about 8pm *ie*, 15 hours after his supposed death. With the deceased person still alive between the hours of 1am to 5am on 18 May 2001, the time of death therefore could never be successfully established. This time the defect related to the time of death. As the deceased when ferried away from Poliklinik Ehsan was still alive though unconscious (as elicited from SP7's testimony or by inference was at home during those hours with his wife), it was crystal clear that the deceased never died at the Poliklinik Ehsan. This issue thus was another ingredient that would be difficult to be established. (paras 21 & 22)

(5) There was no shred of evidence to show how, or who killed the deceased person at Genting Highlands *ie*, if he was killed there at all, as the prosecution's evidence never went beyond the reading room of Poliklinik Ehsan. There was absolutely no evidence of R2 or R1 having killed the deceased at Genting Highlands, even though the latter was alleged to have left with the red car. There was also no evidence adduced to establish that R1 went to Genting Highlands, and even if he did, there was no evidence of him committing any offence there. If the killing had actually taken place at Genting Highlands, with the particulars of the charge stating that the murder had occurred at the Poliklinik Ehsan, the charge at the outset was already defective. (para 23)

(6) With the dismal failure by the prosecution to establish the two ingredients that were highly pertinent to the charge, and the respondents entitled to know with certainty the time and place of the crime, there was a failure to conclude that a *prima facie* case was established; a case merely based on grave suspicion against the respondents would not suffice. No evidence was adduced to show that he died at the hands of the respondents. They thus were entitled to their respective acquittals. (para 24)

(7) SP7 was not a reliable witness and no amount of corroboration could salvage his testimony. With too many chinks appearing in the prosecution's case, especially as regards the defects in the charge, the want of credibility of SP7's testimony, and not a shred of independent corroborative evidence found even if he had been found as reliable, accompanied by other flaws in the prosecution's case, there was no hesitation in dismissing the appeal. (para 25)

Bahasa Malaysia *Translation Of Headnotes*

Responden-responden dituduh membunuh satu Wee Ah Choon, simati, di bawah s. 302 Kanun Keseksaan pada 18 Mei 2001 pada pukul 1 pagi hingga 5 pagi di Poliklinik Ehsan, Jalan Sulaiman, Muar, Johor. Pihak pendakwaan gagal membuktikan kes *prima facie* terhadap mereka dan oleh itu responden-responden dilepaskan tanpa pembelaannya dipanggil. Tidak puas hati, pihak pendakwaan memfailkan notis rayuan yang diperlukan oleh itu halperkara di dalam kes ini. Faktanya adalah pada 20 Mei 2001, satu mayat (yang

kemudiannya dikenali sebagai simati) dijumpai di Kilometer 12, Jalan Batang Kali di Goh Tong Jaya dengan wayar berwarna hijau meliliti lehernya. Pihak polis berjaya menangkap SP7 yang menjadi saksi utama bagi pihak pendakwaan. Menurut SP7, setiap malam di antara 11 malam dan 12 tengah malam, bagi pihak Syarikat Ong Cheng Tock, pemberipinjam wang berlesen, SP7 akan mengutip pembayaranbalik pinjaman yang berjumlah RM100 dari responden kedua (R2), seorang doktor Poliklinik Ehsan. Pada masa SP7 mengutip bayaranbalik pinjaman, R2 telah mengadu kepada SP7 mengenai keterhutangannya kepada simati, alias 'Azman' dan telah meminta SP7 tolongnya membunuh simati. Pada malam kejadian itu, SP7 memberi testimoni bahawa beliau telah ke klinik seperti biasa. R2 berada bersama simati di bilik belakang. Sebaik sahaja SP7 dan responden pertama (R1) seorang pekerja klinik memasuki bilik belakang, SP7 telah memegang bahu simati, diikuti oleh R1 menghentak simati di kepalanya dengan sebatang kayu. Selepas itu, menurut SP7, seorang lelaki bernama Haris telah melilitkan wayar mengelilingi leher Azman. Pada masa material itu, simati tersandar atas kerusi roda. Haris dan kedua-dua responden telah menolak kerusi roda ke bahagian depan klinik menuju ke kereta merah, di mana simati telah diangkut dan diletakkan di bahagian belakang kereta. Mayat simati dijumpai dua hari kemudian dalam keadaan reput dan sebab kematian adalah tekapan pada leher. Kes untuk pihak pembelaan, walaubagaimanapun, adalah SP7 telah memberi pernyataan kepada pihak polis lapan hari selepas penangkapannya oleh itu testimoni beliau tidak boleh dipercayai. R1 dan R2 menafikan penglibatan mereka dan berhujah bahawa pihak pendakwaan telah gagal membuktikan kes *prima facie* oleh itu pelepasan R1 dan R2 tanpa pembelaan mereka dipanggil. Yang Arif Hakim apabila melepaskan pada peringkat pendakwaan berpendapat bahawa keterangan yang diberi oleh SP7 memerlukan pemeriksaan kerana ia tidak selamat untuk menyabit atas keterangan rakan sejenayah yang tak disokong di dalam kes ini. Oleh itu, rayuan ini oleh pihak pendakwaan.

Diputuskan (menolak rayuan)
Oleh Suriyadi Halim Omar HMR:

(1) SP7, dengan pengakuannya sendiri, adalah rakan sejenayah, kerana terlibat dari awal hingga ke masa simati dibawa ke tempat lain di dalam sebuah kereta merah. Fakta-fakta jelas menunjukkan bahawa SP7 telah mengambil bahagian di dalam

pembunuhan simati dan telah dengan cara terbuka mengaku keterlibatan beliau dalam keseluruhan episod ini. Jika mengikut keadaan biasa, SP7 sepatutnya menjadi salah satu yang tertuduh tetapi bukan di dalam kes ini. Oleh kerana SP7 bekerjasama dengan pihak pendakwaan, beliau telah memperolehi imuniti untuk kesalahannya (*Rex v. Mullins* 3 Cox's CC 526). Disebabkan status unik SP7, keterangannya mesti diperiksa sama ada terdapat percanggahan terhadapnya, keterangan yang diberi oleh pihak pendakwaan yang neutral atau tidak, tingkahlakunya, kelakukannya, cara beliau memberi testimoni dan lain-lain.

(2) Didapati bahawa testimoni SP7 tidak sempurna. Tidak terdapat keterangan menyokong yang berasingan untuk menyokong testimoni SP7 mengenai apa yang sebenar-benarnya berlaku pada masa pembunuhan. Untuk dijadikan keterangan menyokong mestilah berasingan dan boleh dipercayai, dan menyentuh isu-isu material, yang membabitkan responden-responden. Pada masa pemeriksaan keterangan, beberapa persoalan dibangkitkan yang telah menyebabkan keadaan runsing dan tidak menandakan pandangan baik untuk pihak pendakwaan.

(3) Ia adalah nyata bahawa dalam setiap pertuduhan kesalahan bagi orang tertuduh mestilah spesifik, dan di dalam kes ini ia adalah pembunuhan di bawah s. 302 Kanun Keseksaan. Kanun Tatacara Jenayah juga menuntut pertuduhan mengandungi butir-butir mengenai masa dan tempat kesalahan yang didakwa berlaku dan orang yang menjadi mangsa kelakuan kesalahan tersebut supaya dengan wajarnya memberi tertuduh notis halperkara beliau dituduhi. Untuk kes *prima facie* berjaya dibuktikan, dan untuk pembelaan dipanggil, pihak pendakwaan mesti membuktikan bahan-bahan utama sesuatu pertuduhan. Pada peringkat ini, pihak pendakwaan hanya dapat membuktikan identiti simati dan kematiannya.

(4) Tiada keraguan bahawa pertuduhan menunjukkan bahawa R1 dan R2 telah membunuh simati, dengan pertolongan beberapa orang di Poliklinik Ehsan di antara jam 1 pagi dan 5 pagi pada 18 Mei 2001. Keterangan isteri simati mengesahkan bahawa kematiannya tidak mungkin berlaku pada masa yang telah dinyatakan di dalam pertuduhan. Isteri simati telah memfailkan

laporan polis pada 20 Mei 2001 menyatakan bahawa simati telah meninggalkan rumah mereka pada 18 Mei 2001 pada pukul 8 malam iaitu 15 jam selepas masa simati dikatakan telah meninggal dunia. Jikalau simati masih hidup di antara jam 1 pagi hingga 5 pagi pada 18 Mei 2001, masa kematian tidak boleh dibuktikan. Kali ini kecacatan berhubungan dengan masa kematian. Oleh kerana simati semasa dibawa ke tempat lain dari Poliklinik Ehsan masih hidup walaupun tidak sedar diri, (seperti didapati dari testimoni SP7 atau melalui inferens berada di rumah pada masa-masa yang disebutkan dengan isterinya), ia adalah jelas sekali bahawa simati tidak mati di Poliklinik Ehsan. Isu ini adalah lagi satu bahan yang sukar untuk dibuktikan.

(5) Tidak terdapat keterangan untuk menunjukkan bagaimana, atau siapa yang membunuh simati di Genting Highlands iaitu jika beliau dibunuh di sana, kerana keterangan pihak pendakwaan tidak menceritakan apa yang berlaku selepas kejadian di Poliklinik Ehsan. Tidak terdapat keterangan R1 dan R2 membunuh simati di Genting Highlands, walaupun mereka dikatakan telah beredar dengan kereta merah tersebut. Tidak terdapat keterangan yang menunjukkan bahawa R1 telah pergi ke Genting Highlands, dan jikalau beliau ke sana pun, tidak terdapat keterangan bahawa R1 telah melakukan kesalahan di sana. Jikalau pembunuhan telah berlaku di Genting Highlands, dengan butir-butir pertuduhan menyatakan bahawa pembunuhan dilakukan di Poliklinik Ehsan, pertuduhan pada permulaannya sudah menjadi defektif.

(6) Dengan kegagalan oleh pihak pendakwaan untuk membuktikan dua bahan yang penting yang berkaitan dengan pertuduhan dan responden-responden berhak untuk mengetahui dengan pastinya masa dan tempat kejadian jenayah, terdapat kegagalan untuk memutuskan bahawa satu kes *prima facie* dibuktikan; kes yang hanya berdasarkan syak yang mendalam terhadap responden-responden tidak memadai. Tidak terdapat keterangan untuk menunjukkan bahawa simati telah mati di tangan responden-responden. Oleh itu masing-masing berhak dilepaskan.

(7) SP7 bukanlah saksi yang boleh dipercayai dan tidak terdapat apa-apa sokongan yang boleh menyelamatkan testimoninya. Dengan beberapa titik-titik yang lemah dalam kes pendakwaan, terutama sekali mengenai kecacatan-kecacatan yang terdapat

dalam pertuduhan, testimoni SP7 yang kurang kredibilitinya, dan tidak terdapat keterangan sokongan yang berasingan didapati jikalau beliau boleh dipercayai, disertai dengan kecacatan-kecacatan lain di dalam kes pendakwaan, rayuan ini mestilah ditolak.

Case(s) referred to:
Choong Oi Choo v. PP [1986] 2 CLJ 231; [1986] CLJ (Rep) 325 HC ***(refd)***
Bhuboni Sahu v. King [1949] AIR 257 ***(refd)***
Director of Public Prosecutions v. Kilbourne [1973] 1 All ER 440 ***(refd)***
Dowse v. Attorney-General, Federation of Malaya [1961] 1 LNS 23 PC ***(refd)***
Jegathesan v. PP [1978] 1 LNS 74 HC ***(refd)***
R v. Baskerville [1916] 2 KB 658 ***(refd)***
Rex v. Mullins 3 Cox's CC 526 ***(refd)***
Tinit & Ors v. PP [1964] 1 LNS 210 HC ***(refd)***
TN Nathan v. PP [1977] 1 LNS 127 HC ***(refd)***

Legislation referred to:
Evidence Act 1950, s. 133
Penal Code, s. 302

For the appellant - Munahyza Mustafa DPP
For the 1st respondent - MK Nijar; M/s Ninijar & Nijar
For the 2nd respondent - Hisyam Teh Poh Teik; M/s Hisyam Teh Poh Teik

[Appeal from High Court, Johor; Criminal Trial No: 45-5-2002 & 45-6-2002]

[Editor's note: For the High Court judgment, please see PP v. Mohd Azam Basiron [2004] 5 CLJ 527.]

Reported by Suhainah Wahiduddin

JUDGMENT

Suriyadi Halim Omar JCA:

[1] The respondents were charged with murdering one Wee Ah Choon the deceased person, under s. 302 of the Penal Code on 18 May 2001 at about 1am to 5am at the Poliklinik Ehsan, Jalan Sulaiman, Muar, Johor. As the prosecution failed to establish a *prima facie* case against them they were acquitted forthwith without the defence being called. The prosecution being dissatisfied thereupon filed the necessary notice of appeal hence the matter before us. At the end of the appeal, we dismissed it.

[2] The facts of the case are as follows. On 20 May 2001 a corpse was found at kilometer 12, Jalan Batang Kali at Goh Tong Jaya, with a piece of green wire still entwined around the neck. Two days later ie, on 22 May 2001 the deceased was identified by the family. Unless, amongst others, the respondents confess to the killing, or unless an accomplice comes forward to assist the prosecution, this case would have ended up as one of the many unsolved murders.

[3] Through its perseverance, the police managed to arrest SP7 and later record his statement. He eventually became the main witness for the prosecution. He was relevant as he had admitted to having collectively participated with the respondents in the murder of the deceased person. The prosecution's case therefore was pivotal on his testimony but as an accomplice. His evidence is as follows. SP7 was a debt collector for Syarikat Ong Cheng Teck, which is a licensed moneylender in Muar. The second respondent (R2), a doctor of Poliklinik Ehsan, was indebted to Syarikat Ong Cheng Teck for a sum of RM40,000 and a larger debt to the deceased. The first respondent (R1) was R2's employee in the clinic.

[4] Each night between 11pm to mid-night, SP7 on behalf of Syarikat Ong Cheng Teck, would collect a loan repayment of RM100 from R2 at the clinic. In the course of collecting the repayments, R2 would complain to him about his indebtedness to the deceased, alias "Azman". He complained that the clinic was essentially the property of the deceased person by reason of his inability to repay the debt. In fact there is evidence to show that he did behave in that manner. In the course of the conversation, two weeks before the murder, R2 had asked SP7 to help him kill the deceased person. R2 had planned that the murder was to take place on the night of 17 May 2001, with the role of SP7 merely to hold down the victim whilst R1 was to strike the deceased's head with a piece of wood. Another person, one Haris Fadhilah bin Buhari who had passed away by the trial date was to assist in the disposal of the body. The body was to be abandoned at Genting Highlands in order to give the impression that he died of an accident there.

[5] So what happened on the said night of the murder? SP7 testified that he went to the clinic as usual to collect the repayment money from R2 for his company. At that time R2 was with the

deceased person at the rear room, which was also the reading room of the clinic. SP7 then together with R1, with the latter leading the way, entered that rear room. They went straight to the deceased person, whereupon as agreed, SP7 held the deceased's shoulders, followed by R1 striking him on the head twice with a piece of wood. The evidence reads, "Lepas diketuk, Azman terus tercentuk, pengsan (the deceased fainted after being struck)."

[6] R2 then instructed his three other employees, who were quite oblivious of the assault, to buy some food. On instruction they left the clinic. Later Haris arrived at the clinic and was introduced by R2 to SP7. Haris went into the reading room, and after a few minutes SP7 saw Haris leaving the reading room hastily, as he wanted to remove the deceased's motorcycle. SP7 helped Haris reposition the motorcycle as it was quite heavy. Haris later rode off with the motorcycle towards the direction of Jalan Sulaiman, Muar. After he left, SP7 re-entered the clinic and sat at the waiting room. When the three workers returned to the clinic R2 asked them to go home as he was closing down the clinic on the pretext of some family matter. They complied with his instructions and returned home.

[7] Haris later returned in a red car and immediately entered the rear (reading) room. R2 came out of the rear room and gave RM1,000 and two cheques worth RM500 each to SP7 for "upah tolong dia untuk bunuh Azman". In fact R2 also wanted to give a handphone to SP7 but he declined to accept. After R2 had re-entered the rear room R1 came out of it, pushing a wheelchair to the reading room. All along SP7 sat in the waiting room. R2 then came out and asked SP7 to help him. SP7 went to the reading room and saw Haris "sedang menyimpul wayar di leher Azman (twisting a wire around Azman's neck)". On seeing that SP7 wanted to leave the clinic, but restrained by R2, who asked him to stay put.

[8] At that material time, the deceased was slumped in the wheelchair with Haris and both respondents helping to push the wheelchair to the front of the clinic towards the red car. SP7 held the doors to allow the wheelchair to pass through. Haris got into the driver's seat. SP7 and OKT2 lifted the deceased and placed him on the rear seat of the car. SP7 saw blood on the deceased's clothes and on the right side of his head. Haris then drove off, together with R1.

[9] SP7 subsequently successfully cashed one of the cheques but not the other as R2 told him that the police were monitoring the clinic, whereupon he threw it away. An additional sum of RM200,000 was promised by R2 to SP7 but payment never materialized. In the course of the trial SP7 failed to divulge the whereabouts of the said wood. The deceased's body was recovered two days later in a state of decomposition with the cause of death being compression on the neck.

[10] The case for the defence was simple. As SP7 gave his statement to the police eight days after his arrest his testimony thus was not worthy of credit. The police released him two days before the arrest of R2. The implication was that the information that led to the arrest of R2 must have come from SP7. R1 denied striking the deceased. R2 stance was that neither was he at the clinic at the material time nor had made any payment of RM1,000 and suggested that SP7 fabricated the story. The two cheques were interest payments for Syarikat Ong Cheng Teck for his debts. The respondents had submitted that the prosecution had failed to prove a *prima facie* case hence the acquittal of R1 and R2 without their defence being called.

[11] The learned judge when acquitting them at the prosecution's stage opined that the evidence of SP7 required examination as it was unsafe to convict on the uncorroborated evidence of an accomplice in this case. By opining such, the learned judge had warned himself of the dangers of convicting on the uncorroborated evidence of SP7.

[12] If we may add, even before reaching the stage of considering the question of corroboration and its adequacy, a presiding judge in the first place needs to decide whether that accomplice is a reliable witness or not. If he is not, the matter ends there, as his evidence has to be rejected, even if the prosecution can adduce evidence capable of being construed as corroboration (*Director of Public Prosecutions v. Kilbourne* [1973] 1 All ER 440). In a given set of facts, an accused person may be convicted premised on an accomplice's uncorroborated testimony pursuant to s. 133 of the Evidence Act 1950, as corroboration is not required as a rule of law. The requirement of corroboration is required only as a rule of practice and prudence (*Tinit & Ors v. Public Prosecutor* [1964] 1 LNS 210; *Bhuboni Sahu v. King* [1949] AIR 257). In a given situation too

where there exists no corroboration, a corroborative warning is required to be administered by the court to itself though the format is not fixed (*Jegathesan v. Public Prosecutor* [1978] 1 LNS 74). It is only in rare instances a trial judge will convict an accused person upon the uncorroborated evidence of an accomplice (*TN Nathan v. Public Prosecutor* [1977] 1 LNS 127). If corroboration is needed implying that the accomplice has passed the hurdle of reliability, such corroboration must be independent and relates to material particulars pertaining to the accused person's culpability (*R v. Baskerville* [1916] 2 KB 658).

[13] Here the learned judge found that even though SP7 gave some details that matched the established facts of the case there existed several unexplained material contradictions. The learned judge found, *inter alia* certain chinks in the very testimony of SP7. If SP7, R1, R2, and Haris were together on the occasion when R2 revealed his plan, surely all the participants would be acquainted with each other. Yet SP7 had testified that he did not know Haris before the incident. SP7 could relate in detail the movements in and out of the reading room after the deceased was struck on his head, but yet failed to see any green wire around the neck of the deceased person when lifting him into the car. Even though the prosecution had established that there was a possible motive on the part of R2 to kill the deceased person that by itself was insufficient excuse to convict here. Suspicion alone certainly was not enough. Needless to say there was no independent evidence adduced confirming in some material particular that R1 and R2 were involved in the commission of the crime.

The Panel's View

[14] We were satisfied that SP7 by his own admission was an accomplice, having been involved from the beginning until the moment the deceased was transported away in a red car, supposedly to be abandoned at Genting Highlands. For his efforts, R2 had rewarded him.

[15] After perusing the grounds of judgment, it was obvious that the learned judge had appreciated the law and its demands regarding the treatment of accomplices by courts. The prosecution parted company with everyone else when it ventilated that even though SP7 was an accomplice, he was still a competent witness against the respondents, and any conviction was not illegal even though founded

upon his uncorroborated testimony (s. 133 of the Evidence Act). Pertaining to any contradiction in the evidence of SP7, the prosecution opined that they were minor and irrelevant and did not affect its case.

[16] The prosecution further submitted that the issue of want of corroboration did not arise here as SP7 was corroborated in many material particulars. As an example the remarks of SP7 that the deceased was struck on the head was corroborated by medical evidence. Only a person who witnessed the killing could have known all that. This piece of corroborative evidence may not necessarily assist SP7, as knowledge of the location of the injury could also mean that he was the one who struck the deceased, and now was passing the blame to someone else. It must be understood that at the prosecution's stage, with both respondents being charged, Haris Fadzilah being dead, and another at large, the last bastion of the prosecution's case was SP7 himself. With such absolute free hand, and no one to contradict him, he could spin any story under the sky, and no one would have been the wiser.

[17] The fact clearly reveals that he participated in the killing of the deceased person and openly confessed his complicity in the whole episode. In normal circumstances, he would be one of the persons charged but not in this case. By co-operating with the prosecution, he had purchased immunity for his offence (*Rex v. Mullins* 3 Cox's CC 526). Due to his unique status, his evidence had to be tested as against his very own, the other evidence adduced by the prosecution neutral or otherwise, his conduct, manner of giving his testimony and the like.

[18] The learned judge found his testimony was far from being impeccable and so did we. To begin with, we likewise found not a shred of independent corroborative evidence to support the testimony of SP7 regarding what actually happened during the time of the killing. To be corroborative the evidence must be independent and reliable, and touching on material issues, which implicate the respondents (*Choong Oi Choo v. PP & Another Case* [1986] 2 CLJ 231; [1986] CLJ (Rep) 325, *Dowse v. Attorney General, Federation of Malaya* [1961] 1 LNS 23). In the course of sifting through the evidence, we were confronted by several questions that caused us certain consternations, and which did not augur well for the prosecution.

[19] Let us discuss the charge now. It is trite that in every charge the offence with which an accused person is charged is specified, and in this case of murder under s. 302 of the Penal Code. The Criminal Procedure Code further demands that the charge shall contain such particulars as to the time and place of the alleged offence and the person against whom the thing in respect of which it was committed as are reasonably sufficient to give the accused person notice of the matter with which he is charged. For a *prima facie* case to be established successfully, in order for the defence to be called, the prosecution must prove the main ingredients of the charge. As at this stage, the prosecution only managed to establish the identity of the deceased person and his death.

[20] There was no doubt that the charge indicated that R1 and R2 killed the deceased, with the assistance of a few people at Poliklinik Ehsan between the hours of 1am to 5am on 18 May 2001. SP7 had explained how the planned murder had taken place as elucidated above. Yet it was obvious that even though struck twice by R1 with a 2.5 feet long piece of wood the deceased person had merely fainted (see RR 81: "Lepas diketuk, Azman terus tercentuk, pengsan). Even after Haris had entwined the wire around the neck of the deceased person he still remained alive (RR 85: Azman masih tercentuk). In fact Azman was still alive when the red car was driven away by Haris towards the direction of Maharani. The rekod rayuan at p. 86 reads:

> Azman diletakkan ditempat duduk belakang dengan keadaan posisi menduduk. Saya tengok Azman boleh gerak, saya ingat dia dah mati.

[21] With the above testimony casting doubt as to the time of death as the deceased was still alive when ferried away, the evidence of the deceased's wife confirmed that his death could not have been during those given times as per the charge. The wife had filed a police report on 20 May 2001 at about 1.05pm stating that the deceased person left the matrimonial home on 18 August 2001 at about 8pm (P58) ie, 15 hours after his supposed death. It must not be forgotten that the prosecution tendered P58 and thus must stand by its evidence. With the deceased person still alive between the hours of 1am to 5am on 18 August 2001, as confirmed by the very testimony of SP7 and the deceased's wife, the time of death therefore could never be successfully established. This time the defect relates to the time of death.

[22] As the deceased when ferried away from Poliklinik Ehsan was still alive though unconscious, (as elicited from SP7's testimony or by inference was at home during those hours with his wife), it was crystal clear that the deceased never died at the Poliklinik Ehsan. This issue thus was another ingredient that would be difficult to be established.

[23] Before the court, there was not a shred of evidence to show how, or who killed the deceased person at Genting Highlands ie, if he was killed there at all, as the prosecution's evidence never went beyond the reading room of Poliklinik Ehsan. There was absolutely no evidence of R2 or R1 having killed the deceased at Genting Highlands, even though the latter was alleged to have left with the red car. There was also no evidence adduced to establish that R1 went to Genting Highlands, and even if he did, there was no evidence of him committing any offence there. If the killing had actually taken place at Genting Highlands, with the particulars of the charge stating that the murder had occurred at the Poliklinik Ehsan the charge at the outset was already defective.

[24] With the dismal failure by the prosecution to establish the two ingredients that are highly pertinent to the charge, and the respondents entitled to know with certainty the time and place of the crime, we likewise failed to conclude that a *prima facie* case was established; a case merely based on grave suspicion against the respondents will not suffice. With such a scenario (the deceased still alive between those hours of 1am to 5am, and the prosecution's very own evidence established that he died somewhere else), and no evidence was adduced to show that he died at the hands of the respondents they thus were entitled to their respective acquittals.

[25] Regardless of the above flaws, let us assess the other pieces of evidence adduced by SP7, which were of no help to the prosecution.

i. The ingredient of connecting the respondents to the scene of the murder, unless SP7's evidence was accepted, appeared an unenviable task, as the prosecution never established that the respondents were present at the scene where the deceased actually died. SP7 said that the deceased was wearing warm clothes when he was ferried away in BCE 8313 but when found, as seen from the photographs, he was wearing a white

short-sleeved T-shirt. It could be inferred that the deceased took time off to change his clothes after having been carted away, thus implying he was still alive despite the story spun by SP7, or he had fabricated the evidence from the beginning. Either way the respondents were exonerated.

ii. On 17 May 2001, SP7 said the murder plan was unfolded by R2 and he was to partake in the heinous plan but in the course of his evidence, stated that he went to the Poliklinik to collect the debt repayment. Either he was being cavalier about the incident or he had said one too many things and had forgotten his earlier story.

iii. We also found the conduct of SP7 rather 'unreal' especially his pretence of being squeamish on seeing the wire around the deceased's neck, and attempting to flee when he had no compunction about holding the deceased down when R1 was striking him. He also said he did not see the wire entwined around the deceased's neck, when earlier on he admitted seeing it. To deny the presence of that green wire around the neck, or not see such an obvious item at such a vulnerable spot was unacceptable, in light of SP5 having testified that when the body was recovered at Genting Highlands, the wire was still there.

iv. Some of the evidence given by SP7 seemed to be too convenient, naive and farfetched in the like of R2's request to assist him kill the deceased person and thereafter recklessly telling many people of his murderous intent.

v. The offer of RM200,000 by R2 to SP7 on the night of the incident without asking for any insurance or security of payment was another of those acts of naivety. It must have been an afterthought uttered in the course of the trial, perhaps after realising how ridiculously measly the payment was for his involvement in such a serious offence; a large sum of money would sound more acceptable. Surely too if SP7 could be paid RM200,000 the other participants likewise could demand similar payments. The foolhardiness of this suggestion is that the gross out-payments would outstrip what was owed to the deceased by R2 and therefore financially

illogical. The purpose of the killing was to be freed of a financial burden ie, from the deceased person, and if the murder merely exacerbated matters, then there was no logic to his elimination.

vi. The plan was quite bizarre as if indeed it was a planned murder, why kill the deceased when the clinic was open for business and with three other co-workers around? The deceased could have effortlessly screamed his head off and alert anyone within hearing distance.

vii. The instruction given that all three co-workers go out to buy food, without leaving someone to man the clinic, would surely create more suspicion than good.

viii. No doubt it was farsighted and sensible to dump the corpse at Genting Highlands in order to cover their tracks, but to recklessly kill the deceased person at the clinic was the height of stupidity, what with so many employees and potential patients around.

ix. The story of dumping the body at Genting Highlands also came from SP7, and, as if to tally with his story, SP7 had testified that the deceased person was wearing a 'baju sejuk' (warm clothes). Yet the neutral evidence (P44-photograph) showed that he was not wearing any warm clothes at all.

x. Further, if indeed it was well planned and R2 had wanted to kill the deceased person that night, why was the car ie, BCE 8313 not already parked outside, to ferry the body?

xi. The issue of which vehicle was used to ferry off the deceased person who was merely unconscious at that time had bothered us. If not for the testimony of SP7, there was no evidence that BCE 8313 was used, as no trace of blood was found in it and this despite the assertion by SP7 that there was blood on the shirt of the deceased, what with his head bleeding. The choice of this car by SP7 as the relevant vehicle to ferry the deceased person was perplexing to say the least. SP5 in the course of the investigation had found blood in the boot and rear seat of vehicle bearing registration number BDN 5288 owned by Haris Fadzilah, yet SP7 doggedly stuck to BCE 8313, although clear of traces of blood.

[26] At the end of the hearing, we held the view that SP7 was not a reliable witness and no amount of corroboration could salvage his testimony. With too many chinks appearing in the prosecution's case, especially as regards the defects in the charge, the want of credibility of SP7's testimony, and not a shred of independent corroborative evidence found even if he had been found as reliable, accompanied by other flaws in the prosecution's case we had no hesitation in dismissing the appeal.

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